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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-82

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
Petitioner

v.

BEN CARTER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA AND TO THE SUPREME COURT OF THE STATE OF GEORGIA

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IN THE

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No.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
Petitioner

v.

BEN CARTER, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA AND TO THE SUPREME COURT OF THE STATE OF GEORGIA

Petitioner, Sheet Metal Workers' International Association, respectfully petitions for a writ of certiorari to review the decision of April 16, 1975 of the Supreme Court of Georgia, denying a petition for a writ of certiorari to review the decision of the Georgia Court of Appeals, and to review the decision of the Georgia Court of Appeals.

OPINIONS BELOW

The denial of the petition for writ of certiorari (Appendix A, *infra,* p. 1a) is reported at — Ga. App. —, — S.E.2d — (1975).

The decision by the Court of Appeals on an expedited appeal from the Superior Court of the County of Richmond (Augusta), Georgia is reported at *Sheet Metal Workers' International Association* v. *Carter and Local 85, Sheet Metal Workers' International Association* v. *Carter,* 133 Ga. App. 872, 212 S.E.2d 645 (1975) (Appendix B, *infra,* pp. 2a-7a).

JURISDICTION

The denial of the writ of certiorari by the Supreme Court of Georgia to review the decision of the Court of Appeals of Georgia was entered on April 16, 1975, (Appendix A, *infra,* p. 1a). Jurisdiction of this Court is noticed under 28 U.S.C. 1257.

QUESTIONS PRESENTED

1. Does the National Labor Relations Act preempt State Court jurisdiction in a peaceful labor dispute action based upon an alleged conspiracy between an International Union, its local and an employer, to willfully and maliciously interfere with employment rights and opportunities, which is arguably covered by the National Labor Relations Act?

2. Does the National Labor Relations Act preempt the State Court jurisdiction in a peaceful labor dispute where it is alleged that the International and its local union sought to impair the reputation of an individual, absent either pleading or proof that the statements were made with knowledge of their falsity, or with reckless disregard of the truth or falsity of the statements?

3. Can the State Court take jurisdiction in a peaceful labor dispute action characterized as a malicious tort because the remedies of punitive damages and attorney's fees cannot be recovered under the National Labor Relations Act?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, U.S.C. 151, et seq.) are set forth in Appendix C, *infra,* pp. 8a-17a.

STATEMENT OF THE CASE

Carter sued the Sheet Metal Workers' International Association and its Augusta Local Union in the Richmond County Superior Court. His complaint alleges the parent union and its local "conspired together, maliciously and willfully, to deprive the plaintiff of his employment in the sheet metal industry and of his means of livelihood, to cause the plaintiff to be denied employment in this industry, to deny the plaintiff his right and privilege to be a member of defendants' union, to impair the plaintiff's reputation among prospective employers, and to subject the plaintiff to embarrassment, scorn and derision among his friends, associates, relatives and fellow employees," (Complaint, p. 1) and that defendants "maliciously, and without probable cause therefor, used the threat of union coercion and pressure to cause the plaintiff to be denied employment of a job in his industry for which he was ready, willing and able to perform," (Complaint, p. 2) and forced an employer of the plaintiff to discharge him and that as a result of defendants' acts, he has been unable to find employment. Plaintiff-

appellee sued for $25,000 as damages, $50,000 as punitive damages and $10,000 as attorney's fees. (Appendix D, *infra*, pp. 18a-20a)

The Richmond County Superior Court, on August 20, 1973, by default judgment found the Sheet Metal Workers International Union liable on the allegations in the complaint. (Appendix E, *infra*, pp. 21a-22a)

Motion to dismiss upon the ground that the state court "did not have jurisdiction of the subject matter of this complaint" was denied by the trial court on May 30, 1974 (Appendix F, *infra*, p. 23a), from which judgment appeal was made to the Georgia Court of Appeals on the ground that "the matter is arguably covered by the National Labor Relations Act, 29 U.S.C. §§ 157 and 158; therefore exclusive jurisdiction of the matter rests with the National Labor Relations Board."

The Court of Appeals held that the National Labor Relations Act did not preempt state jurisdiction in an action based upon a tort conspiracy brought by an employee against a labor union and its local, and that a cause of action based on an alleged malicious and willful tort with a claim for punitive damages is not within the exclusive federal regulatory scheme.

The Georgia Supreme Court denied the union's petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

The decision of the Court below in the instant case is in conflict with the decision of the United States Supreme Court in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, (1959), inasmuch as the Court below seeks to extend the principle of specific exemptions therein enumerated, where the exclusive com-

petence of the Board does not apply to "circumstances of violent conduct and imminent threats to public order" to include "any matter involving malicious tort" arising out of a conspiracy by labor unions as set out in the case at bar.

The Georgia courts in the instant case are refusing to yield jurisdiction where the activities here involved constitute unfair labor pactices, and are subject to the National Labor Relations Act. The state court claims jurisdiction because there is a willful and malicious tort, which among other things, subjects plaintiff to embarrassment, scorn and derision, and seeks punitive damages and attorney's fees, claiming the National Labor Relations Board cannot afford a complete remedy, and because of the incomplete remedy, the National Labor Relations Board does not have sole jurisdiction.

In taking jurisdiction the Georgia Court is acting contrary to the principles enunciated in *Garmon,* to wit:

> But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these *determinations be left in the first instance to the National Labor Relations Board.* (Emphasis ours) 359 U.S. 236, at 244-245.

The Court below in the instant case relies on the U.S. Supreme Court decision in *Linn* v. *Plant Guard Workers,* 383 U.S. 53 (1966), where the court ruled that there was a state judicial remedy for malicious libel during a union organizing campaign, to the individual alleging such libel. Here, the Court below has erroneously extended state jurisdiction to "all suits alleging malicious tort arising out of a union conspiracy," even though

in this case the willful and malicious tort did not arise out of "defamatory statements published with knowledge of their falsity, with reckless disregard as to whether they were true or false." (at 65)

The trial court below entered a default judgment against this international union, holding it liable for damages on allegations in the complaint, which allegations do not meet the criteria of *Linn, Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO* v. *Austin,* 418 U.S. 264 (1974), and the standards adopted in *Linn* of the case of *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). (Appendix E, *infra,* pp. 21a-22a)

The Court below is misapplying the Supreme Court decision in *Linn, supra,* inasmuch as the United States Supreme Court in that case said:

> Construing the Act to permit recovery of damage in a state cause of action *only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false,* guards against abuse of libel actions, and unwarranted intrusion upon free discussion envisioned by the Act. (Emphasis ours) 383 U.S. 53 at 65.

The *Linn* case was further clarified by the United States Supreme Court in the *Austin* case, *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO* v. *Austin,* 418 U.S. 264 (1974)

In *Austin,* the Supreme Court reversed the state court judgments of compensatory and punitive damages based upon statements made with malice, saying the awards reflected "a fundamental misunderstanding of the holding in *Linn*", 418 U.S. 264 at 281. *Linn*

explicitly adopted the standards of *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964), which permit recovery only if the defamatory publication was with knowledge that it was false or with reckless disregard of whether it was false or not. The Court below takes jurisdiction without regard to the principles in *Linn,* as clarified and upheld in *Austin.*

The Georgia court here took jurisdiction and entered judgment upon the allegations of the complaint which did not allege the facts which meet the standards in the *Linn* case as adopted from *New York Times* v. *Sullivan,* and which completely ignored the rule that preemption fails only when "the defamatory statement was made with knowledge of its falsity or with reckless disregard of its truth or falsity."

Thus, the Supreme Court decision in *Austin* sought "to prevent state jurisdiction from intruding upon the free discussion envisioned by the National Labor Relations Act when the Court held that recovery of damages was permitted only where (1) the defamatory statements were made with knowledge of their falsity or with reckless disregard of their truth or falsity, and (2) there was proof of actual damage." *The Developing Labor Law,* American Bar Association Labor Relations Section 800 (C.J. Morris ed. 1971).

The decision of the Court below in the instant case is in conflict with *Local 100 of the United Association of Journeymen and Apprentices* v. *Borden,* 373 U.S. 690, (1963,) and *Local 207, International Association of Bridge, Structural and Ornamental Iron Workers Union* v. *Perko,* 373 U.S. 701. In these decisions, the Supreme Court holds that under the doctrine of preemption, state courts lack jurisdiction to entertain claims against labor organizations for willful and mali-

cious interference with employment rights and opportunities, even when punitive damages are available under the state law or a conspiracy is involved. The fact that the conduct complained of in a state court was willful and malicious, constituted a common-law tort, involved a conspiracy or was remedied by punitive damages was of no significance to the Supreme Court in *Borden* and *Perko,* for, as the court has repeated on numerous occasions, the question is whether the conduct complained of was arguably subject to the exclusive jurisdiction of the National Labor Relations Board, not whether the *remedy or label or designation* under state law is different than under federal labor law.

The Court below sought to affix the label under state law of "willful and malicious tort with a claim for punitive damages." The Supreme Court has already held:

> *It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction.* Rather, as stated in *Garmon*, supra (359 U.S. at 246), '[o]*ur concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.*' (Emphasis ours)
>
> In the present case the *conduct* on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." (Court's emphasis) *Borden*, 373 U.S. 690, at 698 (1963).

The same concern was expressed in *Amalgamated Association of Street, Electric Railway and Motor Coach*

Employees of America v. *Lockridge,* 403 U.S. 274 (1971), wherein the court stated: "It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern." (403 U.S. 274, at 292)

In *Garmon,* the Supreme Court also considered the question of whether an award for damages on an injunction might not conflict with the active assertion of federal authority, and concluded that to sanction either involved a conflict with federal policy by allowing two lawmaking sources to govern. "In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the state to grant a remedy (here) which has been withheld from the National Labor Relations Board only accentuates the danger of conflict." at 247.

The decision of the Georgia Court seeks to establish the superiority of the private interest over the public interest contrary to the holding of the Supreme Court in *Garner* v. *Teamsters, Chauffeurs, and Helpers Local Union No. 776,* 346 U.S. 485 (1953), which held that federal power for the protection of both public and private interest cannot be curtailed by a state procedure applying some doctrine of private right, and to the extent that the private right may conflict with the public one, the former is superseded.

If this decision stands, it would nullify and destroy the theory of the principle of preemption established in *Borden, Perko* and *Garmon, supra.* It is also in conflict with other state court decisions including *Westmoreland* v. *Gordon's Transports, Inc.,* La. App. , 181 So.2d 859 (La. App. 1966); *Hinchman* v. *Local 100, International Brotherhood of Electrical Workers,* La. App. , 199 So.2d 818 (La. App.

1974); *International Union of Operating Engineers, et al.* v. *Casida, et al.*, 376 S.W. 2d 814 (Tex. Civ. App. 1964), each of which have followed the preemption doctrine of *Borden* and *Perko*.

Unless this Court reverses the Georgia Court, it will allow state courts to enter labor disputes in direct contradiction to the National Labor Relations Act, and the enunciated decisions of the United States Supreme Court. It will thwart the established national labor policy as created by the Congress. It will permit state court jurisdiction on any claim upon malicious tort in which there is a claim for punitive damages and attorney's fees, and would establish new theories of jurisdiction based on available state remedies instead of on the basis of conduct and activities of the parties. If this decision is permitted to stand it will have a drastic effect on decisions of the United States Supreme Court. If this decision is permitted to stand it will have a drastic effect on all labor organizations, on the members of the labor organizations, on labor and industrial relations policies throughout the country, would subject companies to the same kind of litigation, and would negate the application of a national labor policy under the National Labor Relations Act within the field above recited and above stated.

CONCLUSION

If the preemption doctrine established by the Supreme Court is to mean anything, then this state court decision must be reviewed, by granting this petition for a writ of certiorari.

Respectfully submitted,

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July 14, 1975

APPENDIX A

29866

SUPREME COURT OF GEORGIA

ATLANTA, April 16, 1975

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

Sheet Metal Workers' International Association v. Ben Carter

Upon consideration of the application for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied. All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, July 1, 1975

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

APPENDIX B

49788. SHEET METAL WORKERS' INTERNATIONAL ASSOC.
v. CARTER
C-110

49789. LOCAL 85, SHEET METAL WORKERS &c. v. CARTER
C-111

CLARK, *Judge.*

Does the National Labor Relations Act preempt state jurisdiction in an action based upon a tort conspiracy brought by an employee against a labor union and its local? This question is presented by the instant appeal. For in-depth discussions of the doctrine of federal preemption in labor disputes see articles in 83 Harv. L. Rev. 552 (1969) and 85 Harv. L. Rev. 1337 (1972).[1]

Carter sued the Sheet Metal Workers International Association and its Augusta local union in the Superior Court of Richmond County. His complaint alleges the parent union and its local "conspired together, maliciously and wilfully, to deprive the plaintiff of his employment in the Sheet Metal Industry and of his means of livelihood, to cause the plaintiff to be denied employment in this Industry, to deny the plaintiff his right and privilege to be a member of defendants' union, to impair the plaintiff's reputation among prospective employers, and to subject the plaintiff to embarrassment, scorn and derision among his friends, associates, relatives and fellow employees." (R. 4). He avers that in January 1972 the representatives of the defendants "acting for and under the specific instructions of all defendants herein, maliciously, and without probable cause therefor, used the threat of union coercion and pressure to cause the plaintiff to be denied employment of a

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[1] These are respectively by Michael A. Broomfield, *Preemptive Federal Jurisdiction Over Concerted Trespassory Union Activity* and by Archibald Cox, *Labor Law Preemption Revisited.*

job in his industry for which he was ready, willing and able to perform." (R. 5). The pleading further states defendants forced an employer of the plaintiff to discharge him and that as a result of defendants' acts, he has been unable to find employment. Plaintiff-appellee sued for $25,000 as damages, $50,000 as punitive damages, and $10,000 as attorneys fees.

Each defendant filed separate motions to dismiss upon the ground that "this court does not have jurisdiction of the subject matter of this complaint" together with their answers denying the allegations. The trial court denied both motions to dismiss from which judgments these appeals have been taken separately with requisite review certificates.

The Unions succinctly state their position to be that "the matter is arguably covered by the National Labor Relations Act, 29 United States Code, Sections 157 and 158; therefore exclusive jurisdiction of the matter rests with the National Labor Relations Board." In their erudite briefs able counsel for both unions have listed many cases, including our Supreme Court cases of *United Brotherhood of Carpenters &c.* v. *Briggs,* 218 Ga. 742 (130 SE2d 707) and *Armstrong Cork Co.* v. *Joiner,* 221 Ga. 789 (147 SE2d 317). Neither *Briggs* nor *Joiner* concerned an individual tort. Inasmuch as these as well as their foreign citations rest upon the leading case of San Diego Building Trades Council v. Garmon, 359 U.S. 236 (79 SC 773, 3 LE2d 775) we will, in the interest of space, limit our discussion to that opinion. There Justice Frankfurter pointed out the basic point: "The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy." Id. at 246. To avoid this hazard the tribunal established the principle which appellants here assert that "when an activity is arguably subject to § 7 and § 8 of the Act, not only the State Courts but the Federal courts must

defer to the exclusive competence of the Labor Board if the danger of State interference with National policy is to be averted."

We noted (as did appellants) that the *Garmon* case also states at its conclusion on page 247 that previous holdings "... have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order ... [and] to enjoin such conduct."

It is true that the instant case does not involve the specific excepted circumstances of violent conduct and imminent threats to public order. Nevertheless, it must be observed that there are other situations where state court jurisdiction is appropriate. Thus, in Linn v. Plant Guard Workers, 383 U.S. 53 (86 SC 657, LE2d (1966)) the court ruled the state judicial remedy of a tort suit by an aggrieved individual was available for malicious libel occurring during a union organizing campaign. There it was held that the state remedy for malicious libel could be pursued along with a NLRB remedy if the conduct complained of also constituted an unfair labor practice. In short, both the state and federal remedies would be available in appropriate cases when they are not inconsistent.

Subsequently in Taggart v. Weinacker's, Inc., 397 U.S. 223 (90 SC 876, 25 LE2d 240) a concurring opinion by Chief Justice Burger enlarged upon the situations wherein state jurisdiction existed in labor cases. We deem the Chief Justice's views to be applicable to the instant appeals. At page 228 he said "*Garmon* left to the States the power to regulate any matter of 'peripheral concern' to the NLRA or that conduct that touches interests 'deeply rooted' in local feeling and responsibility.' (359 U.S. at 243, 244). Few concepts are more 'deeply rooted' than the power of a State to protect the rights of its citizens."

We recognize the instant case may be within the jurisdiction of the National Labor Relations Board even though

it does not involve an employer as a party. Nevertheless, the state's concern "to protect the rights of its citizens" require us to acknowledge that the plaintiff here would be deprived of certain legal rights in the event we ruled the state court lacked jurisdiction. We refer to the fact that the power of the NLRB is limited by the provisions of the federal statute. When the Board finds either a union or an employer guilty of an unfair labor practice it has the power to enter a cease-and-desist order " . . . and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . " 29 U.S.C. § 160(c). Although the appellant Unions argue that this remedy would enable the NLRB to make the plaintiff whole, it is obvious that it does not include power to award him exemplary damages or attorneys' fees. Under Georgia law a plaintiff has the right upon presentation of proper proof satisfactory to the court and jury to receive punitive damages (Code Ann. § 105-2002). Reasonable attorneys' fees also may be awarded in certain instances. Code Ann. § 20-1404; *Traders Ins. Co.* v. *Mann,* 118 Ga. 381, 384 (45 SE 426); *Roberts Pest Control* v. *McDonald,* 132 Ga. App. 257, 260 (4) (208 SE2d 13).

As is observed in the *Linn* case at page 63: " . . . The Board can award no damages, impose no penalty, or give any other relief to the defamed individual. On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary argument for pre-emption . . . " The court's observation dealt with a libel action but those views are appropriate to the instant case. Moreover, this special situation

as to punitive damages was recognized in International Union U.A.W. v. Russell, 356 U.S. 634 (78 SC 932, 2 LE2d 1030). There the Court noted that "Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct. United Workers v. Laburnum Corp., 347 U.S. 656, 666-667." *Id.* page 643. It ruled that plaintiff was entitled to maintain his action in the state jurisdiction stating that " . . . an employee's right to recover, in the State Courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here. . . . " *Id.* page 646.

In making our decision we decline to follow the 1955 ruling of our court in *Collins* v. *Merritt-Chapman & Scott,* 91 Ga. App. 856 (87 SE2d 337) wherein a contrary conclusion was reached. That opinion was concurred in by only two judges with the third judge concurring specially while expressing his disagreement with the majority's view as to the NLRB pre-empting state jurisdiction. A decision which is not concurred in by all the judges constituting a division is not a controlling precedent. Court Rule 26(c); Code Ann. § 24-3626(c); *Powell* v. *Smith,* 70 Ga. App. 754, 768(2) (29 SE2d 521). Accordingly, Collins v. Merritt-Chapman & Scott, supra, is expressly disapproved of and will not be followed.

In *Hudgens* v. *Local 315, Retail &c. Union,* No. 49328, decided Oct. 4, 1974, 133 Ga. App. 329 (— SE2d —), we, upheld a trial court's ruling that Federal jurisdiction of a labor dispute preempted the state courts. We noted that the matter was already pending before the National Labor Relations Board when a state injunction and declaratory judgment was sought. We considered it proper to have the labor dispute completed in the jurisdiction in which proceedings were pending with adequate available remedies. We there stated expressly that "our ruling in no

way limits the right of state courts to handle civil damage suits which may arise from labor disputes." That applies to the instant suit which is similar in nature to the *Linn* case where the United States Supreme Court recognized the individual suing on a claim of malicious libel could proceed in the state court for his tort claim even though the claim might also involve a labor dispute which could be pursued in the federal jurisdiction. There would be no conflict in the two remedies nor recovery twice for the same damages. As was noted in *Linn* at page 646, the plaintiff "could not collect duplicate compensation for lost pay from the state courts and the Board."

In ruling that the state court has jurisdiction of this malicious tort action we do not infringe upon nor rule contrary to the holding of Local No. 438, Construction &c. Laborers Union v. Curry, 371 U.S. 543 (93 SC 531, 9 SE2d 514) relied upon by appellants. There an employer had sought injunctive relief against picketing claimed to be in violation of the Georgia Right-To-Work Law. On that basis our Supreme Court ruled the picketing to be for an unlawful purpose and to be enjoined. *Curry* v. *Construction &c. Union Local,* 217 Ga. 513 (123 SE2d 653). The U. S. Supreme Court reversed on the basis that there existed at least an arguable violation of the National Labor Relations Act so that the State Court had no jurisdiction to issue an injunction or to adjudicate the controversy as it lay within the exclusive power of the National Labor Relations Board. As we have heretofore opined, the instant case based on an alleged malicious and wilful tort with a claim for punitive damages is not within the exclusive federal regulatory scheme.

Judgment affirmed. Bell, C. J., and Quillian, J., concur.

APPENDIX C

RIGHTS OF EMPLOYEES

§ 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in **other** concerted activities for the purpose of collective bargaining or other mutual aid or protection, **and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).**

UNFAIR LABOR PRACTICES

§ 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this

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The provisions of the original National Labor Relations Act are in roman type; provisions added by the Labor-Management Relations Act (1947) are in boldface type; and provisions added by the Labor Management Reporting and Disclosure Act (1959) are in *italics*. Material deleted by either of those statutes is enclosed by brackets.

Act as an unfair labor practice) to require as a condition of employment membership therein **on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later,** (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made **[and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 9(f), (g), (h)], and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;**

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) **It shall be an unfair labor practice for a labor organization or its agents—**

(1) **to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided,**

That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (b) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4)(i) to engage in, or to induce or encourage [the employees of any employer] *any individual employed by any person engaged in commerce or in an industry affecting commerce* to engage in, a strike or a [concerted] refusal in the course of [their] *his* employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services [,]; *or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce,* where *in either case* an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or [any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person] *to enter into any agreement which is prohibited by section 8(e);*

(B) *forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or* **forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [;]**: *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;*

(C) **forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;**

(D) **forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work;**

Provided, **That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer, is required to recognize under this Act [;]**: *Provided further, That for the purposes of this paragraph (4) only, nothing contained in such*

paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) **to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; [and]**

(6) **to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed[.];** *and*

(7) *to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is cur-*

rently certified as the representative of such employees:

(A) *where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,*

(B) *where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or*

(C) *where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.*

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

(c) **The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed,**

graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times, and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporated any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be re-opened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

(e) *It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to*

the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: Provided further, *That for the purposes of this subsection (e) and section 8(b)(4)(B) the terms "any employer", "any person engaged in commerce or in industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry:* Provided further, *That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.*

(f) It shall not be an unfair labor practice under subsections(a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement

specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: Provided, *That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act:* Provided further, *That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).*•

• Section 8(f) is inserted in the Act by subsection (a) of Section 705 of Public Law 68-257. Section 705(b) provides: "Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."

APPENDIX D

IN THE SUPERIOR COURT OF RICHMOND COUNTY, GEORGIA

Civil Action No. 3147-C

BEN CARTER, *Plaintiff*

vs.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION AND LOCAL 85 OF SHEET METAL WORKERS' INTERNATIONAL ASSN., *Defendants*

Complaint

Now COMES the plaintiff, pleading against the defendants in the above styled matter and respectfully shows unto the Court the following facts:

1.

At all times mentioned herein, the defendants, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION AND LOCAL 85 OF SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, were and are labor organizations and associations doing business in Richmond County, Georgia, and have members in Richmond County, Georgia, upon whom service can be made, and the defendants are therefore subject to the jurisdiction of this Court as is permitted under Georgia Laws 1959, Pages 44-45.

2.

Beginning in January of 1972, the defendants conspired together, maliciously and wilfully, to deprive the plaintiff of his employment in the Sheet Metal Industry and of his means of livelihood, to cause the plaintiff to be denied employment in this Industry, to deny the plaintiff his right and privilege to be a member of defendants' union, to im-

pair the plaintiff's reputation among prospective employers, and to subject the plaintiff to embarrassment, scorn and derision among his friends, associates, relatives and fellow employees.

3.

In January of 1972, pursuant to, and in furtherance of, said conspiracy defendants' agents, officers and members, acting for and under the specific instructions of all defendants herein, maliciously, and without probable cause therefor, used the threat of union coercion and pressure to cause the plaintiff to be denied employment of a job in his industry for which he was ready, willing and able to perform.

4.

In March of 1972, pursuant to this same scheme and conspiracy, these individuals coerced and forced an employer of the plaintiff to dismiss the plaintiff from a job in his industry which he then presently held.

5.

As a result of the aforesaid acts, the plaintiff has been unable to find employment in his industry, and he is entitled to recover, among other things, the wages he has lost for the aforesaid acts of the defendants.

6.

The plaintiff is therefore, entitled to recover from the defendants for the aforesaid acts and conduct damages in the sum of Twenty Five Thousand and no/100 ($25,000.00) dollars, punitive and exemplary damages in the sum of Fifty Thousand and no/100 ($50,000.00) dollars and attorney's fees in the sum of Ten Thousand and no/100 ($10,000.00) dollars.

WHEREFORE, plaintiff demands that he have judgment against the defendants as follows:

A. Damages in the sum of Twenty Five Thousand and no/100 ($25,000.00) dollars.

B. Punitive and exemplary damages in the sum of Fifty Thousand and no/100 ($50,000.00) dollars.

C. Attorney's fees in the sum of Ten Thousand and no/100 ($10,000.00) dollars.

D. The interests and costs of this action.

E. And such other and further relief as the Court may deem proper.

/s/ WILLIAM R. MCCRACKEN
William R. McCracken
Attorney for Plaintiff

Of Counsel:

HARRIS, CHANCE & MCCRACKEN
Suit 500
The 500 Building
Augusta, Georgia 30902
(404) 722-7348

APPENDIX E

IN THE SUPERIOR COURT
RICHMOND COUNTY, GEORGIA

CIVIL ACTION No. 3147-C

BEN CARTER, *Plaintiff*

vs.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, *et al., Defendants*

Order

A Motion by the plaintiff in the above matter against the defendant, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, requesting judgment on the pleadings, in that the said defendant has failed to file a timely Answer in the manner required by law, came on to be heard before me at 10:00 a.m. on July 24, 1973, and after hearing the argument of Counsel representing both parties, it is Decreed, Ordered and Adjudged by the Court that:

A. That the plaintiff is entitled to verdict and judgment by default against the defendant, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION;

B. That with the exception of claimed damages in plaintiff's complaint all of the allegations of said complaint as against the defendant, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, are admitted as true by said defendant as a matter of law;

C. That the plaintiff is required to introduce evidence and establish the amount of said damages before a jury as against said defendant;

D. That the defendant at said jury trial is allowed the right to introduce evidence as to the damages sued for by

the plaintiff, the defendant referred to herein being the SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION.

This the 20th day of August, 1973.

/s/ WILLIAM M. FLEMING,
William M. Fleming,
Judge
Superior Court, Richmond County,
Georgia

APPENDIX F

IN THE SUPERIOR COURT FOR THE COUNTY OF RICHMOND, STATE OF GEORGIA

CIVIL ACTION, FILE No. 3147-C

BEN CARTER, *Plaintiff*

v.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION

and

LOCAL 85 OF SHEET METAL WORKERS' INTERNATIONAL ASSN., *Defendants*

Order

The motions to dismiss of Sheet Metal Workers' International Association and of Local 85 of Sheet Metal Workers' International Association, respectively, came on regularly to be heard, and after argument of counsel IT IS ORDERED AND ADJUDGED that each of said motions be, and the same is denied.

This 30th day of May, 1974.

/s/ EDWIN D. FULCHER
Edwin D. Fulcher
J.S.C.A.J.C.

Filed in office this 30th day of May, 1974.

[Illegible]
Deputy Clerk

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SEP 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-82

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
Petitioner,

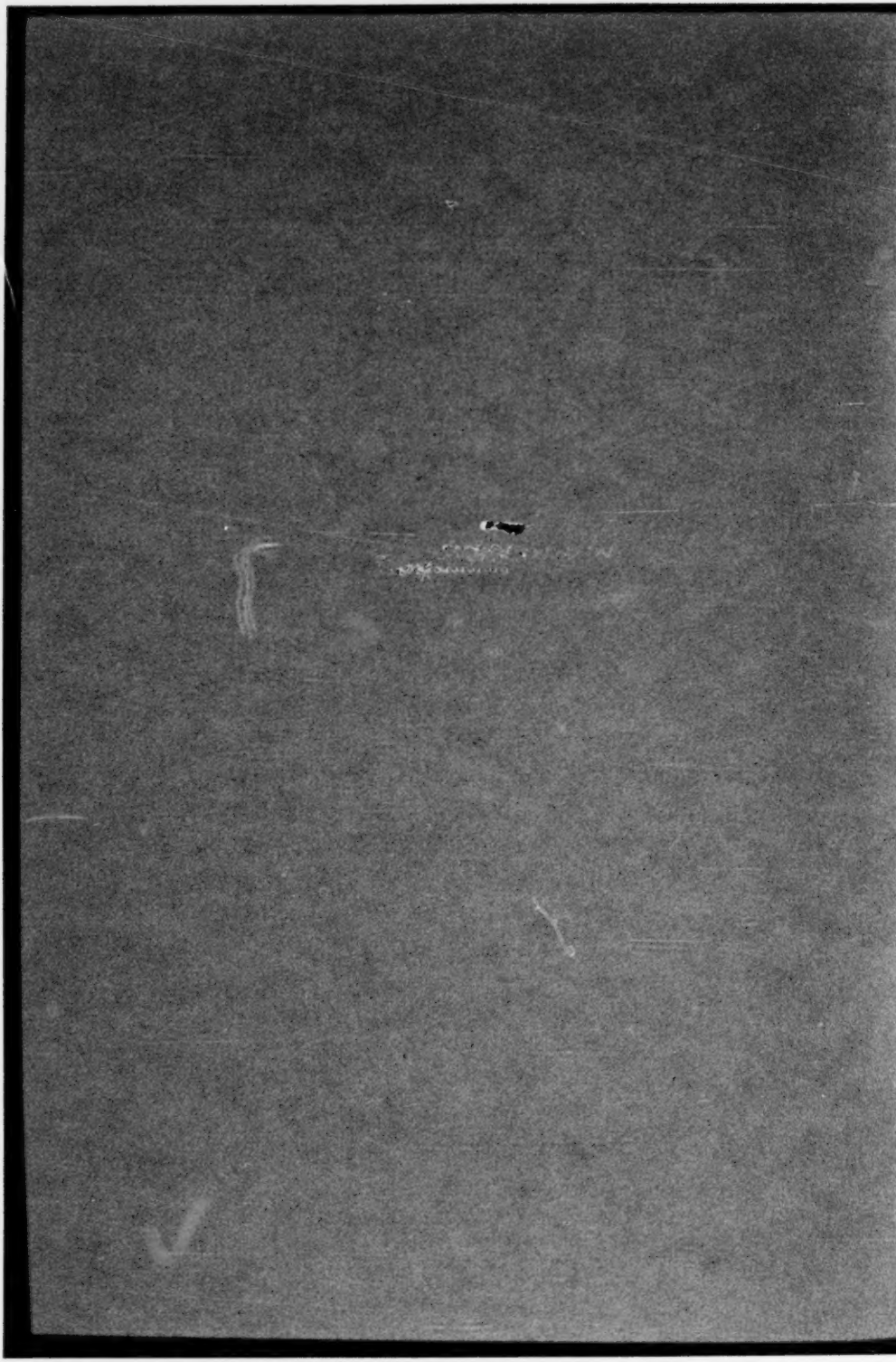
v.

BEN CARTER, *Respondent.*

RESPONDENT'S BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA AND TO THE SUPREME COURT OF THE STATE OF GEORGIA

WILLIAM R. MCCRACKEN
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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.



IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-82

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION,
Petitioner,

v.

BEN CARTER, *Respondent.*

RESPONDENT'S BRIEF TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA AND TO THE SUPREME COURT OF THE STATE OF GEORGIA

Respondent, Ben Carter, respectfully prays unto the Court that this Court deny the petition for writ of certiorari by the petitioner to review the decision of April 16, 1975, of the Supreme Court of Georgia, denying a petition for a writ of certiorari to review the decision of the Georgia Court of Appeals, and to review the decision of the Court of Appeals.

QUESTION PRESENTED

1. Whether or not the National Labor Relations Act pre-empts State jurisdiction in an action based upon a tort conspiracy brought by an employee against a labor union and its local.

ARGUMENT

The decision of the Court below that petitioner seeks to reverse is controlled by the principles stated in *Vaca* v. *Sipes,* 386 U.S. 171 (1967) and *Linn* v. *United Plant Guard Workers of America, Local 114,* 383 U.S. 53 (1966). In *San Diego Building Trade Council* v. *Garmon,* 359 U.S. 236 (1959), there is set out the general doctrine of NLRB pre-emption in the field of labor law. The decisions in *Vaca* and *Linn* clearly define and represent the present status of the legally recognized exceptions to the broad doctrine of pre-emption enunciated in *Garmon.*

The doctrine of federal pre-emption as defined in *Garmon* is basically that where the activity involved is "arguably protected" by § 7 of the National Labor Relations Act or constitutes an unfair labor practice under § 8 of the Act, then the doctrine of pre-emption should apply, to wit:

> When it is clear or may be fairly assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that the state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the

> States have acted through laws of broad general application rather than laws specifically directed toward the governance of industrial relation. Regardless of the mode adopted, to allow the State to control conduct, which is the subject of national regulation, would create potential frustrations of national purposes. 359 U.S. 236, at 244.

However, while recognizing the above as a correct statement of the principle of pre-emption, there are, nonetheless numerous exceptions to this doctrine. *Smith* v. *Evening News Association,* 371 U.S. 195 (1962); *Carey* v. *Wesinghouse Electric Corporation,* 375 U.S. 261, 272 (1964); *Vaca* v. *Sipes,* 386 U.S. 171 (1967); *United Construction Workers, etc.* v. *Laburnum Construction Corporation,* 347 U.S. 656 (1954); *International Union, United Automobile, etc. Workers* v. *Russell,* 356 U.S. 634 (1958); *Linn* v. *United Plant Guard Workers,* 383 U.S. 53 (1966); *International Association of Machinists* v. *Gonzales,* 356 U.S. 617 (1958).

The exceptions to the doctrine of pre-emption involve a variety of factual situations and no two cases appear to involve identical or substantially similar, factual situations or relationships. This Court has in the past expressed concern over the problem of balancing the federal pre-emption doctrine against the availability of state court jurisdiction.

In *Vaca* v. *Sipes,* 386 U.S. 180, the Supreme Court commented:

> . . . While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature

> of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies. 386 U.S. 180, at 180.

There do not appear to be any cases wherein a Court could clearly apply a definite, fixed standard in ruling on the issue of preemption. The standard or rule, at the most, appears to be a nebulous one. This Court has held the doctrine of pre-emption does not apply in cases "where the activity regulated was merely a peripheral concern of the Labor Management Relations Act". Nor does it apply in cases where the activity touches "interests so deeply rooted in local feeling and responsibility". In such latter instances the court has held that in the "absence of compelling congressional direction" this Court could not infer that Congress had deprived the States of the power to act. *Vaca* v. *Sipes,* 386 U.S. 171, at 180.

The respondent, Ben Carter, is not a member of the petitioner's union nor of its local. The employer or employers involved are not a party to this action. Respondent simply maintains that the petitioner and its local conspired together to deprive him of his employment. It cannot be denied that conceivably some of the facts alleged may constitute an unfair labor practice. However, this in and of itself should not demand pre-emption. The overall thrust of respondent's complaint is an action based on common law conspiracy wherein he sues for actual damages, punitive damages and attorney's fees. Basically stated, the action is one involving a willful and malicious tort.

The case of *Linn* v. *United Plant Guard Workers,* 383 U.S. 53 (1966) is analogous to the instant case.

In *Linn,* this Court held that an action by a company manager against a union and others for damages for alleged defamation in the court of a labor campaign was not pre-empted and therefore the claimant in that case could pursue his claim for damages under state law. In *Linn* this Court stated:

> In light of these considerations it appears that the exercise of state jurisdiction here would be a "merely peripheral concern of the Labor Management Relations Act", provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that "an overriding state interest" in protecting its residents from malicious libels should be recognized in these circumstances. . . . 383 U.S. 53, at 60.

In *Linn* this Court, after recognizing that the NLRB "could award no damages, impose no penalty or give any other relief to a defamed individual", concluded:

> On the contrary, State remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the "personal" injury caused by the malicious libel with its inability to provide redress the maligned party, vitiates the ordinary argument or pre-emption . 383 U.S. 53, at 63.

The decision of the Court below is merely a decision following the rule set out in *Linn.* Even though the cause of action in *Linn* and the cause of action in the instant case involved different factual situations, the rule of *Linn* should, nonetheless, apply. The employer is not a party to this action. The respondent is not even a member of the petitioner's union. Respondent is a non-union laborer and the complaint is one under

state law for damages. The decision below does not adversely affect or undermine the broad federal scheme of this country's labor management relationships and policies.

CONCLUSION

The National Labor Relations Act does not pre-empt state jurisdiction in an action based upon a tort conspiracy brought by a non-union member-employee against a labor union and its local.

Respectfully submitted,

WILLIAM R. MCCRACKEN
HARRIS, CHANCE & MCCRACKEN
505 Courthouse Lane
Augusta, Georgia 30901
Attorney for Respondent

September 19, 1975

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-82

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, PETITIONER

v.

BEN CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF GEORGIA AND TO THE SUPREME COURT OF THE STATE OF GEORGIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation of October 20, 1975. The question presented is whether the National Labor Relations Act preempts a state court suit for damages brought by an employee who alleges that the union wrongfully caused him to be denied employment, and injured his reputation. The United States is of the view that the record at this stage of the proceedings is inadequate for consideration of this question.

STATEMENT

Ben Carter filed a complaint in the Superior Court of Richmond County, Georgia, alleging that the Sheet Metal Workers' International Association (the International) and its affiliated Local 85 (the Local) "conspired together, maliciously and wilfully, to deprive the plaintiff of

his employment in the Sheet Metal Industry, and of his means of livelihood, to cause the plaintiff to be denied employment in this Industry, to deny the plaintiff his right and privilege to be a member of defendants' union, to impair the plaintiff's reputation among prospective employers, and to subject the plaintiff to embarrassment, scorn and derision among his friends, associates, relatives and fellow employees" (Pet. App. 18a-19a). The complaint further alleged that, in furtherance of this conspiracy, the defendants "maliciously * * * used the threat of union coercion and pressure to cause the plaintiff to be denied employment of a job in his industry * * * [and] coerced and forced an employer of the plaintiff to dismiss the plaintiff from a job in his industry which he then presently held" (Pet. App. 19a). "As a result of the aforesaid acts, the plaintiff has been unable to find employment in his industry" (*ibid.*). The complaint sought actual damages, including lost wages, of $25,000, punitive damages of $50,000, and attorney's fees of $10,000 (Pet. App. 19a-20a).

A default judgment was entered against the petitioner,the International, upon its failure to file a timely answer to the complaint (Pet. App. 21a-22a). The Local filed a timely answer.

Thereafter, both defendants filed motions to dismiss the complaint on grounds that the subject matter was preempted by the exclusive jurisdiction of the National Labor Relations Board. The superior court denied the motions to dismiss (Pet. App. 23a), and both defendants appealed to the Georgia court of appeals, which affirmed the denials (Pet. App. 2a-7a).[1]

---

[1]Denial of the motions to dismiss leaves the International with a default judgment against it on the merits, but facing trial on the issue of damages (Pet. App. 21a-22a), while the Local faces trial on both the merits and the damage issue. The superior court denied the International's motion for a separate trial.

The court of appeals ruled that "an alleged malicious and wilful tort with a claim for punitive damages is not within the exclusive federal regulatory scheme" (Pet. App. 7a). Noting the Board's lack of power to grant punitive damages, the court quoted this Court's statement in *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 63-64, that "* * * The Board can award no damages, impose no penalty, or give any other relief to the defamed individual. On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the 'personal' injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary argument for pre-emption * * *" (Pet. App. 5a). The Georgia court also relied on the statement in the concurring opinion in *Taggart* v. *Weinacker's, Inc.,* 397 U.S. 223, 228, that *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236, "left to the States the power to regulate any matter of 'peripheral concern' to the NLRA or that conduct that touches interests 'deeply rooted in local feeling and responsibility' " (Pet. App. 4a).

The Supreme Court of Georgia denied the International's application for certiorari to review the judgment of the court of appeals (Pet. 1a). The International then filed the instant petition for a writ of certiorari.

DISCUSSION

Although there is a threshold question whether the denial of a motion to dismiss constitutes a "final judgment" within the meaning of 28 U.S.C. 1257, the question of finality need not be reached because the skeletal nature

of the record makes this case inappropriate for review at this stage of the proceedings.[2]

---

[2]Only the International—which is under a default judgment—is petitioning for review of the Georgia court's denial of its preemption claims. That court considered the merits of the preemption issue despite the default, apparently on the ground that, if the lower court lacks jurisdiction over the subject matter, the default judgment is void and the case should be dismissed. *Hughes Tool Co.* v. *Trans World Airlines,* 409 U.S. 363 (antitrust default judgment reversed following determination of damages, on ground that Civil Aeronautics Board jurisdiction preempted the subject matter). The question of damages owed by the International remains to be decided. When that question is resolved, the International will be able to raise again the preemption issue on petition to this Court from the Georgia courts, even if certiorari is denied in this proceeding. *Hughes Tool Co.* v. *Trans World Airlines, supra,* 409 U.S. at 365, n. 1.

The requirement of finality functions to prevent "piecemeal review of state court decisions." *North Dakota Pharmacy Board* v. *Snyder's Stores,* 414 U.S. 156, 159. However, in Local No. 438, *Construction and General Laborers' Union* v. *Curry,* 371 U.S. 542, 550, the Court held that "[t]he policy of 28 U.S.C. §1257 against fragmenting and prolonging litigation and against piecemeal reviews of state court judgments" did not bar review of a state court temporary injunction alleged to be preempted by the Board's exclusive jurisdiction, where issuance of the temporary injunction "may effectively dispose of petitioner's rights and render entirely illusory his right to review here as well as his right to a hearing before the Labor Board." *Ibid.* The Court further pointed out that there were no actual issues left for determination by the state courts on the merits, because the state courts had in fact conclusively ruled on the merits in the temporary injunction proceedings, finding that the picketing in issue violated the Georgia right-to-work laws. Thus, the Court concluded that "[s]ince there was nothing more of substance to be decided in the trial court, the judgment below was final within the meaning of 28 U.S.C. §1257" (*id.* at 551). And see *Avery* v. *Midland County,* 390 U.S. 474, 478, n. 2; *Mills* v. *Alabama,* 384 U.S. 214, 217-218.

In this case, no injunction has issued and the state court has not decided whether the conduct alleged in fact violates state law. At the subsequent trial, it is open to the Local to defend on that basis, and, in so doing, it may more clearly delineate the preemption issue (see *infra,* pp. 5-7). Similarly, while only the damage issue is open to the International at a further trial, the facts on damages may likewise place the preemption issue in better focus.

a. The complaint alleges two instances of a denial of employment opportunities (Pet. App. 19a), but the employers are neither identified nor is there any other indication that their operations affect commerce to the extent that the Board would have asserted jurisdiction over them. Cf. *Radio and Television Broadcast Technicians Local Union 1264* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255. While Carter's failure thus far to deny the requisite effect on commerce suggests that the employers were subject to the Board's jurisdiction (see *Local Union of the United Association of Journeymen* v. *Borden*, 373 U.S. 690, 694, n. 4 ("*Borden*"); *Local No. 207, Int'l Assoc. of Bridge Workers Union* v. *Perko*, 373 U.S. 701, 705, n. 3 ("*Perko*"), a trial would doubtless amplify the jurisdictional facts.

b. There is an allegation of union interference with employment opportunities, but no details as to why the unions took such action against Carter. Similarly, there is an allegation that the unions improperly denied Carter union membership, but no allegation that the alleged interference with employment was due to lack of union membership (Pet. App. 19a).

If the unions' interference with Carter's employment ship or because of some dereliction on his part concerning union obligations (other than the financial obligations which could be imposed under a valid union security agreement), their action would violate Section 8(b)(1)(A) and (2) of the National Labor Relations Act (NLRA), as amended, 29 U.S.C. 158(b)(1)(A) and (2).[3] In contrast, if the unions were merely enforcing lawful

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[3] *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40-42; *National Labor Relations Board* v. *Int'l Hod Carriers*, 295 F.2d 657, 658 (C.A. 7); *National Labor Relations Board* v. *Teamsters, Local 182*, 228 F. 2d 83, 84 (C.A. 2); *Local 1437, Carpenters*, 210 NLRB 359, 360.

contractual arrangements which precluded Carter's hiring, their actions would be protected by Section 7 of the Act, 29 U.S.C. 157.[4] In either case, contrary to the view of the Georgia court of appeals, the state suit would be barred by the NLRA (assuming Board "commerce jurisdiction" over the employers involved). See *Borden* and *Perko, supra*; and *Amalgamated Assoc. of Street Employees* v. *Lockridge,* 403 U.S. 274 ("*Lockridge*"). These cases make plain that, irrespective of the label affixed to the cause of action under state law, where the crux of that action is that a union has caused an employee to be deprived of employment opportunities because of "union" considerations, the matter is exclusively for the Board to adjudicate. Nor is it relevant that the Board cannot award the full panoply of remedies which the state could provide. With respect to matters of employment discrimination, which, unlike libel (involved in *Linn, supra*), are central, and not merely peripheral, to the regulatory scheme of the NLRA, "[c]onflict in technique can be fully as disruptive to the system Congress erected as conflict in overt policy." *Lockridge, supra,* 403 U.S. at 287.

On the other hand, if the unions' action against Carter were prompted by reasons unrelated to his lack of union membership or failure to comply with union obligations, the preemption issue would become more complex. If the unions were Carter's bargaining representative, their action might entail a breach of their duty of fair representation. But while a federal standard governs determination of that question, the courts, as well as the Board, have jurisdiction to enforce that duty. *Vaca* v. *Sipes,* 386 U.S. 171. And if the unions owed Carter no duty of fair representation, or their allegedly tortious conduct had no relation to Carter's right to join or refrain from joining

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[4] *Local 357, Teamsters* v. *National Labor Relations Board,* 365 U.S. 667; *Boston Cement Masons & Asphalt Layers Union No. 534 (Duron Maguire Eastern Corp.),* 216 NLRB No. 90, 88 LRRM 1348; *Local 673, Laborers International Union,* 171 NLRB 894, 899, and cases at n. 8.

the union, their conduct might be wholly outside the interests which the National Labor Relations Act is designed to protect. Cf. *Lummus Co.* v. *National Labor Relations Board*, 339 F. 2d 728, 733-735 (C.A.D.C.). The record as it now stands leaves these questions wholly unilluminated.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1976.

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[5] *Borden, Perko,* and *Lockridge, supra,* came to the Court after the facts were fully developed at a trial.

Another matter warranting clarification is whether the assertion in the complaint that the unions impaired Carter's "reputation among prospective employers" and subjected him "to embarrassment, scorn and derision among his friends, associates, relatives and fellow employees" (Pet. App. 19a) refers to alleged libelous conduct on the part of the unions. Under *Linn, supra,* 383 U.S. at 65, the state remedy for libel is limited by a federal "malice test to effectuate the statutory design with respect to" preservation of the NLRA's guarantees of free discussion, but the courts clearly have jurisdiction to decide the question.